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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PUERTO RICO MARITIME SHIPPING AUTHORITY,
Petitioner,

v.

FEDERAL MARITIME COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

(1) Whether the Court of Appeals discarded traditional restraints upon the scope of judicial review of agency determinations in sustaining an agency action based upon events occurring after the record before the agency had closed, (a) by improperly finding that the agency drew its conclusion from evidence in the record and (b) by providing a rationale for the agency action that played no part at all in the agency's adverse determination.

(2) Whether the Court of Appeals applied improper legal criteria in its review of the test-year ratemaking process for domestic offshore carriers implemented by the Federal Maritime Commission when it permitted the agency to adjust one of the carrier's cost estimates because of "dramatic changes in circumstances" while failing completely to provide for presentation of offsetting adjustments in other cost or revenue estimates at the same point in time.

PARTIES TO THE PROCEEDING

Parties to this proceeding in the Court of Appeals, No. 81-2088, in addition to petitioner Puerto Rico Maritime Shipping Authority * and respondent Federal Maritime Commission, were the United States of America, statutory respondent pursuant to 28 U.S.C. §§ 2344 and 2348, which filed a statement indicating that it neither supported nor opposed the order of the Federal Maritime Commission under review in the Court of Appeals; Trailer Marine Transport Corporation, intervenor in support of petitioner Puerto Rico Maritime Shipping Authority; the Government of the Virgin Islands and the Puerto Rico Manufacturers Association, intervenors in support of respondent Federal Maritime Commission; and the Drug and Toilet Preparation Traffic Conference, Inc., intervenor in support of respondent Federal Maritime Commission. The Government of the Virgin Islands and the Puerto Rico Manufacturers Association filed a cross-petition for review of the Commission's order in the Court of Appeals, docketed as No. 81-2128, which was consolidated with No. 81-2088. Puerto Rico Maritime Shipping Authority intervened in that proceeding in support of the Federal Maritime Commission, as did Trailer Marine Transport Corporation and Sea-Land Service, Inc.

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* Puerto Rico Maritime Shipping Authority is a non-stock corporation owned by the Commonwealth of Puerto Rico; Puerto Rico Marine Management, Inc., is its wholly-owned operating agency.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING PETITION	9
1. The Court's Misreading of the Statute	10
2. The Absence of Evidence of Record of Dramatic Changes In World Oil Markets	12
3. The Court's Attack On PRMSA's Methodology	14
4. The Court's Decision Conflicts With the *Indiana Municipal* Case	17
CONCLUSION	19
APPENDIX—SEPARATELY PRESENTED	

TABLE OF AUTHORITIES

CASES: Page

FPC v. *Texaco, Inc.*, 417 U.S. 380 (1974) 14
Gulf States Utilities Co. v. *FPC*, 411 U.S. 747 (1973) 14
Indiana & Mich. Mun. Distrib. Ass'n v. *FERC*, 659 F.2d 1193 (D.C. Cir. 1981) 8-10, 14, 17-19
Indiana Municipal Elec. Ass'n v. *FERC*, 629 F.2d 480 (7th Cir. 1980) 8, 10, 14, 17-19
SEC v. *Chenery*, 318 U.S. 80 (1943) 14
Villages of Chatham & Riverton, Ill. v. *FERC*, 662 F.2d 23 (D.C. Cir. 1981) 8-10, 14, 17-19

STATUTES:

Shipping Act, 1916, 46 U.S.C. § 801 *et seq.* 2
Section 18(a), 46 U.S.C. § 817(a) 2
Section 25, 46 U.S.C. § 824 19
Intercoastal Shipping Act, 1933, as amended (Public Law 95-475), 46 U.S.C. § 843 *et seq.* 2, 10-11
Section 2, 46 U.S.C. § 844 2
Section 3(a), 46 U.S.C. § 845(a) 2
Section 3(b), 46 U.S.C. § 845(b) 2-3
Section 3(c)(2), 46 U.S.C. § 845(c)(2) 2, 4

REGULATIONS:

46 C.F.R. § 502.67(a)(2), (3) & (4) 2
46 C.F.R. § 512.1 2
46 C.F.R. § 512.2(f) 2

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v.

FEDERAL MARITIME COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Puerto Rico Maritime Shipping Authority prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered May 14, 1982, affirming an order of the Federal Maritime Commission finding a portion of certain ocean freight rates filed by the Puerto Rico Maritime Shipping Authority to be unjust and unreasonable and requiring refunds of those freight charges.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported at this time and is reproduced in the Appendix at pages 1a-50a. The order of the Federal Maritime Commission is reported at 20 Shipping Regulation Reports (Pike & Fischer) 1627 (1981), and is reproduced in the Appendix

at pages 51a-97a. The initial decision of the administrative law judge is reported at 20 Shipping Regulation Reports (Pike & Fischer) 1319 (1981), and is reproduced in the Appendix at pages 98a-230a.

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit entered the judgment sought to be reviewed on May 14, 1982, and denied a timely petition for rehearing and suggestion for rehearing en banc on June 25, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

Sections 2, 3(a), 3(b), and 3(c)(2) of the Intercoastal Shipping Act, 1933, as amended, 46 U.S.C. §§ 844, 845(a), 845(b), & 845(c)(2) (Public Law 95-475), are set forth in the Appendix at pages 234a-238a. Section 18(a) of the Shipping Act, 1916, 46 U.S.C. § 817(a), appears in the Appendix at pages 233a-234a. The relevant regulations of the Federal Maritime Commission, 46 C.F.R. § 502.67(a)(2), (3) & (4), 46 C.F.R. § 512.1, and 46 C.F.R. § 512.2(f), are set forth in the Appendix at pages 238a-242a.

STATEMENT OF THE CASE

Petitioner Puerto Rico Maritime Shipping Authority ("PRMSA") is a common carrier by water, serving the trade between U.S. Atlantic and Gulf Coasts and Puerto Rico. In these trades, PRMSA is subject to the regulatory jurisdiction of the Federal Maritime Commission ("FMC" or "the Commission") under the Shipping Act, 1916, 46 U.S.C. § 801 *et seq.*, and the Intercoastal Shipping Act, 1933, 46 U.S.C. § 843 *et seq.* The general rate increases at issue in this case were originally filed by PRMSA in December 1980 and averaged 17.2 percent; the increases became effective on February 27, 1982.

PRMSA's competitors, Sea-Land Service, Inc. ("Sea-Land"), Trailer Marine Transport Corporation ("TMT"), and Gulf Caribbean Marine Lines ("GCML"), had filed similar general rate increases to become effective in January 1981. The increases filed by all of the carriers were protested by the Drug and Toilet Preparation Traffic Conference, Inc. ("DTPTC," a shipper trade organization), the Government of the Virgin Islands and the Puerto Rico Manufacturers Association ("GVI/PRMA"), and the Chamber of Commerce of Puerto Rico. Prior to the effective date of the PRMSA general rate increases, the Commission had ordered an investigation, without suspension, of the rate increases of Sea-Land, TMT, and GCML. By order served on February 27, 1981, PRMSA's rate increases (also not suspended) were made the subject of the same investigation. The investigation, Docket No. 81-10, was the first trade-wide investigation held under Public Law 95-475, the 1978 amendments to the Intercoastal Shipping Act, 1933.

Under the Intercoastal Shipping Act as amended by Public Law 95-475, stringent time deadlines are established for the investigation of general rate increases exceeding three percent. Under those deadlines, any hearing ordered is to be completed within sixty days; an initial decision by the Administrative Law Judge ("ALJ") is to be rendered within 120 days; and a final decision by the Commission is to be served within 180 days. § 3(b), Intercoastal Shipping Act, 1933, 46 U.S.C. § 845(b). The statute provides that the Commission may, in its discretion and for good cause, extend the time period for ultimate decision for sixty days provided it reports to Congress, *inter alia*, the reasons for such extension. In this case, the hearing was concluded on May 6, 1981;[1]

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[1] In order to complete this trade-wide investigation (which "specified" almost every issue which could be comprehended by a rate filing) in the stringent time periods established by Public Law 95-475, the record was developed almost entirely on written testimony. There were three rounds of such testimony: direct

and the final briefs had been submitted to the ALJ by June 15, 1981. On June 5, 1981, the Commission granted an extension of the time for final decision from July 28, 1981 to September 26, 1981. Pursuant to that extension, the ALJ issued his decision on July 20, 1981; that decision recommended approval of PRMSA's rate increases. On September 25, 1981, the Commission issued its decision, disapproving PRMSA's increases to the extent they exceeded a weighted average of 14.5 percent. The Commission ordered PRMSA to roll back its rates within thirty days, to make refunds to shippers of those portions of the rate increases found to be unreasonable, plus interest as required by statute (46 U.S.C. § 845(c)(2)), and to file within sixty days a full accounting of all refund payments made. The primary basis for the Commission's disapproval of a part of the PRMSA increases was its rejection of PRMSA's forecasted average price of fuel for the test year.

PRMSA had forecast its fuel cost as part of its general rate increase application. Of necessity, that forecast was made in November 1980, in preparation for the December filing of the increase. The forecast was based upon: (1) a showing of correlation between the *actual* prices PRMSA paid for its refined oil (Bunker C) and Average Refiners Acquisition Domestic (ARAD) crude

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testimony of all parties was submitted on March 10, 1981; rebuttal testimony on April 10, 1981; and surrebuttal testimony on April 23, 1981. Cross-examination of only one witness, on only rate of return issues, was requested and granted and such cross-examination occurred on April 29, 1981. Although the sixty-day deadline for termination of the hearings expired on May 2, 1981, counsel for the carrier-respondents accommodated a request of counsel for the Government of the Virgin Islands to hear oral testimony of Virgin Islands shippers on the "economic hardship" issue and such a hearing was held in St. Thomas on May 4, 1981. Additionally, to accommodate requests that had come to the Commission staff from a few Puerto Rican shippers, an oral hearing, also restricted to economic hardship issues only, was held in Puerto Rico on May 6, 1981.

oil *actual* prices as reported by Data Resources, Inc. (DRI)[2] for the years 1978-1980; and (2) a projection of bunker fuel cost for the pro forma 1981-1982 year which produced a high degree of correlation (99.5%) with DRI's *forecast* for ARAD crude oil. The DRI forecast used was the latest available, viz., the November 1980 DRI forecast.

PRMSA's fuel forecast was attacked only by GVI/PRMA. The Commission's Bureau of Investigation and Enforcement ("BIE"), which actively participated in the proceedings, submitted testimony approving both PRMSA's forecast methodology and its result, and the DTPTC submitted no testimony on the issue. GVI/PRMA insisted that the November 1980 DRI forecast had been effectively superceded by a March 1981 DRI forecast. PRMSA argued in response that the March 1981 DRI forecast yielded more *pessimistic* results than the earlier November 1980 DRI forecast, and the ALJ agreed, finding in his recommended decision that the alternative fuel projection of GVI/PRMA yielded slightly lower costs *not* because of any difference between the November and March DRI forecasts, but because of GVI/PRMA's highly flawed methodology. App. C at 193a-194a. The initial decision sustained PRMSA's fuel projection in the following words:

> As explained in PRMSA's opening brief (p. 125-127), PRMSA used a forecast based upon the forecast of Average Refiners Acquisition Domestic (A.R.A.D.) prices by Data Resources, Inc. (DRI), the same widely-used service discussed above in connection with the inflation factor issue. PRMSA then compared A.R.A.D. forecasts with its own experience with oil prices using recognized statistical measuring

[2] DRI is a highly respected, independent organization which publishes, among other things, a forecast of ARAD prices. The ARAD forecast is constructed by DRI through the use of its extensive state-of-the-art econometric modeling and its substantial data gathering capabilities.

techniques. BIE witness Straube examined PRMSA's forecasting technique and found it to be reasonable.

Id. The ALJ had also determined that PRMSA's oil projection should be adjudicated on the basis of events known to PRMSA when it prepared the forecast, for the following reasons:

> The problem is that the carriers had to make their forecasts of increases in the price of oil back in November 1980 or before, approximately when they first submitted their cases to the Commission. Now that we are, at the time of writing, in July, the crazy oil market continues to amaze and dumbfound. Every day one can read different predictions. First one authority says that the Saudis will call off their game with OPEC and curtail production so as to raise prices. Then another authority claims that the Saudis have to maintain current production to finance domestic projects. Both PRMSA and GVI/PRMA attach conflicting cartoons and newspaper articles. The point is that no one really knows how long the current oil glut will last. Consequently, if we try to apply the most current daily prices of oil to any carrier's original forecast to make a new forecast, there is no way of knowing that such a forecast is more reliable than that which was originally submitted, even if it were conceptually sound to assume that later data would always supply a more reliable base merely because such data were more recent.
>
> . . . Commission rate cases, based on testing carriers' forecasting methodologies, are prospective, not retroactive. In other words, to the largest extent possible, in order to assure responsible forecasting by carriers, they are not allowed to produce *ad hoc*, i.e., after-the-fact justifications. Similarly, if protestants are allowed to rely upon later, current events, this is a form of retroactive, *ex post facto* type of decisionmaking so that even if the carrier utilized the best techniques available at the time it filed its rate

> increases, it would be forced to make refunds and pay interest at something like 20 percent because of later events which the carrier could not have reasonably anticipated.

App. C at 192a-193a.

The Commission, however, disapproved PRMSA's fuel forecast, offering three reasons, the first-stated of which was abandoned as factually wrong on appeal. The FMC's second-stated reason was "dramatic changes in world oil markets . . . since the initiation of the proceeding," and its last-stated reason was a criticism of the methodology employed by PRMSA in making its fuel cost projections. App. B at 77a-78a. Discarding PRMSA's forecast based upon these factors, the Commission instead utilized the last known PRMSA price paid in a twenty-day period in March 1981 as a set price for PRMSA's fuel cost in the test year. App. B at 78a-79a. The dissenting Commissioner would have adopted the initial decision and approved PRMSA's rate increase in full. Separate Opinion of Commissioner Daschbach, App. B at 97a.

On October 7, 1981, PRMSA filed a petition for review of the Commission's order in the United States Court of Appeals for the District of Columbia Circuit, jurisdiction of that Court being based upon section 2344 of title 28 of the United States Code.[3] PRMSA argued on appeal that there was no basis for the FMC's criticisms of PRMSA's forecast methodology, and that those criticisms cloaked the FMC's sole reason for disapproving PRMSA's fuel cost projections: the fact that "dramatic changes in world oil markets" had occurred after the close of the record which led the FMC to believe that PRMSA's fuel costs for the test year would eventually prove to be much lower than its estimates.

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[3] On November 20, 1981, the Court of Appeals granted a stay of the Commission's order insofar as it required the payment of refunds to shippers, and on February 4, 1982, the Court ordered that the stay be continued in effect until final disposition of the cases.

PRMSA argued that consideration of matters not a part of the record in the proceeding was improper, and that the FMC could not, consistently with the Court's decisions in *Villages of Chatham & Riverton, Ill.* v. *FERC*, 662 F.2d 23 (D.C. Cir. 1981) (*"Chatham"*), and *Indiana & Mich. Mun. Distrib. Ass'n* v. *FERC*, 659 F.2d 1193 (D.C. Cir. 1981) (*"I&M"*), and with the Seventh Circuit's decision in *Indiana Municipal Elec. Ass'n* v. *FERC*, 629 F.2d 480 (7th Cir. 1980) (*"Indiana Municipal"*), disapprove an estimate that was reasonable when made *unless* there was record evidence of a substantial disparity between the estimate and actual results *and unless* it was shown that use of the estimate would yield overall an unreasonable result. PRMSA pointed out that if the FMC wished to take account of events occurring after the record had closed or after the forecast was made, it could do so, consistently with the cited cases, only if it afforded the parties an opportunity to introduce in evidence any offsetting considerations affecting other cost or revenue projections *at the same point in time.* That point of view accorded with the D.C. Circuit's decision in *I&M*, which, citing the Seventh Circuit's decision in *Indiana Municipal*, said:

> [C]hallengers must go beyond establishing a substantial disparity between the test-year and historical figures. They must proceed to establish that the use of the estimate would yield, overall, an unreasonable result by showing, for example, that there were no offsetting considerations . . . .

I&M, *supra*, 659 F.2d at 1198 n.14, citing *Indiana Municipal*, *supra*, 629 F.2d at 484. Since PRMSA's fuel cost projection was reasonable when made, and since PRMSA had no opportunity to show post-forecast events affecting other cost or revenue predictions (*e.g.*, the deepening recession) which would offset the post-forecast events perceived by the FMC as reducing PRMSA's fuel costs, PRMSA argued that the FMC erred in disapproving its fuel cost forecast.

The Court of Appeals (Circuit Judges Wald, Mikva, and Ginsburg) rejected PRMSA's argument that its fuel cost estimate was reasonable when submitted (App. A at 18a-20a), and found that "the Commission used the changes occurring in world oil markets that *were* documented in the record, *see* J.A. at 704-12, to reject PRMSA's forecast methodology . . . ." App. A at 21a. The Court likewise held that PRMSA had overread its decisions in *I&M* and *Chatham*:

> As we read those decisions, an agency is permitted to accept an estimate that does not comport with what actually happened later on, *but the agency is not required to blindfold itself, ignoring dramatic changes in circumstances which surface during the ratemaking proceeding and are bound to affect the estimate.*

App. A at 24a (emphasis added). Further, the Court said:

> The agency should not and cannot, consistent with its statutory obligation, base rates on cost estimates that, *even if reasonable when first presented, are later contradicted by record evidence and would lead to an unjustified burden on shippers.* Moreover, a carrier like PRMSA may file expedited general rate increases if and when it finds the rates allowed by the Commission to be too low, while shippers have no comparable remedy for rates that prove too high. We thus conclude that the agency acted appropriately in . . . rejecting the earlier PRMSA estimate as the basis for projecting fuel costs in the test year.

App. A at 26a (emphasis added).

REASONS FOR GRANTING PETITION

This case presents two important issues for this Court's determination. The decision by the Court of Appeals presents issues calling for an exercise of this Court's power of supervision in that the Court of Appeals, in

disguising the FMC's reliance on post-record events and in providing a rationale for the Commission's decision which was never relied upon by the Commission, departed from the accepted and usual course of judicial proceedings. Moreover, the Court's efforts to affirm the improper agency decision—efforts which may have emanated from the Court's misreading of the Intercoastal Shipping Act—resulted in the application by the Court of legal standards for review of the test-year ratemaking process for domestic offshore carriers which conflict with the standards applied by the 7th Circuit to the test-year ratemaking process at other agencies. Thus (1) the Court misread the Intercoastal Shipping Act when it concluded that carriers have a remedy when the rates allowed by the FMC are too low whereas there is no comparable remedy for shippers when rates prove to be too high; (2) the "dramatic changes in circumstances" upon which the FMC based its decision surfaced *after* the close of the record and *not* "during the ratemaking proceeding"; (3) with respect to the methodology underlying PRMSA's projection, the Court attacked it for reasons never offered by the FMC; and (4) the Court's application of the standard set in *Indiana Municipal*, *Chatham*, and *I&M* results in omission of the most salient part of that standard—the determination of whether or not use of the estimate rendered faulty by "dramatic changes in circumstances" will in fact lead to an unreasonable result. These matters are addressed in turn.

1. The Court's Misreading of the Statute

The opinion of the Court of Appeals reveals that it clearly misread the Intercoastal Shipping Act, and hence misperceived the balance to be achieved between carrier interests and the interests of the shipping public under the Act. The Court said (App. A at 18a):

> In addition, the Commission took cognizance of the legal right under the statute of the carrier to file a cost-pass-through rate increase if it turned out that

> fuel prices actually were above the base cost, whereas shippers would have no adequate remedy if the allowed estimate turned out to be too high.

The same misstatement of fact was used to justify the result achieved when the Court said (App. A at 26a):

> Moreover, a carrier like PRMSA may file expedited general rate increases if and when it finds the rates allowed by the Commission to be too low, while shippers have no comparable remedy for rates that prove too high.

There is absolutely no cost-pass-through authority in the Shipping Acts or even in the Commission's regulations. PRMSA had and has no "legal right" to file a cost-pass-through rate increase to reflect higher bunker costs, higher labor costs, lower revenues, or any other profit-reducing factor.[4] There is no statutory authority for "expedited general rate increases." The Court was wrong.[5]

The Court of Appeals thus erroneously believed that the carrier could have redress if the FMC erred in its

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[4] In addition, there is no legal authority, either under the Shipping Acts or elsewhere, for an ocean common carrier to charge rates retroactively. Thus "if it turned out" that any element of PRMSA's projection were incorrect—and the overall impact of that fact could not be known until the *end* of any test year—there would be no mechanism for collecting a higher rate for that past period. PRMSA could go to the FMC with a general rate increase *for the future*, but can never recover the losses of the past.

[5] All the FMC regulations permit is (1) the filing of small rate increases (less than 3%) on 30 days notice without the voluminous data normally required, or (2) an application for permission to file on less than statutory notice—a mechanism usually used for rate changes on individual commodities and only in the most exceptional of circumstances, if then, for general rate increases. Even for category (1), the FMC is at liberty and likely to subsequently require, as a condition for avoiding suspension, the filing of justification materials, especially when the increase is for a period covered by a prior test year.

determination, whereas the shipping public could not. We respectfully suggest that in its attempt to reach a result perceived to be protective of the public interest, the Court overstepped traditional restraints upon the scope of its review of an agency decision, as detailed in the following sections.

2. The Absence of Evidence of Record of Dramatic Changes In World Oil Markets

As the Court observed (App. A at 17a):

> [T]he Commission found that "dramatic changes in world oil markets have caused [the ARAD] forecasts to change substantially since the initiation of the proceeding." C.D. at 33; J.A. at 33.

The Court rejected PRMSA's contention that there was no evidence in the record to support a finding of "dramatic changes in world oil markets." The Court said (App. A at 20a):

> [T]he record does reflect that world oil markets were in a state of flux at the time of the ratemaking hearings. *See* J.A. at 701-02, 704-12. Although the newspaper articles and other materials inserted in the record dealing with potential stagnation in the oil market might not compel any particular conclusion as to the future of world oil prices, they were sufficient to arouse a legitimate uneasiness and skepticism about a prediction based solely on the experience of the prior year . . . .

The nine pages of magazine and newspaper articles cited by the Court (App. F at 243a-271a), *all from October 1980 and January-February 1981, were the only evidence relating in any way to prospective changes in oil markets.* The Court was absolutely correct that these materials do not "compel any particular conclusion as to the future of world oil prices." App. A at 20a. They may be read to show, as the Court said, "potential stagnation" or a "state of flux" in the oil market, but a perusal of them

plainly shows that they do *not* demonstrate the "dramatic changes in world oil markets" or the "marked changes in circumstances" *upon which the FMC explicitly based its rejection of PRMSA's forecast*, for the simple reason that, as indeed is well known, such "dramatic" changes came *after* the OPEC meeting of May 1981.

Over and over again the Court demonstrated its own unease with the implications of a decision based on post-record evidence by insisting that the FMC's reference to changes in the oil market was based upon evidence *in the record*. *E.g.*, App. A at 21a, 25a.* While the Court might correctly point to the articles in the record as showing, in its words (App. A at 20a) "uneasiness and skepticism" about continued increasing fuel prices, no one can possibly point to those articles as showing dramatic changes in the oil market. But the FMC, which cited to *no* evidence of record, did not speak of unease or skepticism; it pointed to a definite "dramatic" event which had already taken place: the change in world oil markets. Indeed, the Court may have let the cat out of the bag when it later said (App. A at 26a): "It may seem at first glance unfair to a carrier operating in a fast-breaking energy market to be forced to react and adjust to events *up to the moment of decision*." (Emphasis added.) The FMC did indeed make an adjustment based on events up to the moment of decision, events *not* reflected in the record at J.A. 704-12 (App. F at 243a-271a), or elsewhere.

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* Thus, in addition to the quote cited above, the Court says: "First, the Commission used the changes occurring in world oil markets that *were* documented in the record, *see* J.A. at 704-12 [the same nine pages, see App. F at 243a-271a] . . ." (App. A at 21a, emphasis in original); "Instead, the Commission has used information *in the record* about later developments in the oil market . . ." (App. A at 25a, emphasis supplied); ". . . we hold that it was well within the discretion of the Commission to consider information *on the record* concerning current developments in the oil market . . ." (*id.*, emphasis supplied).

It is plain that the FMC relied on post-record events and it is equally plain that the Court's opinion—while repeatedly emphasizing the necessity for evidence *on the record* (page 13 and note 6 *supra*)—adroitly disguises the total absence from the record of evidence of the changes upon which the FMC *actually* based its decision. The Court has thus enabled itself to completely avoid the entire thrust of PRMSA's argument, and the entire point informing *Indiana Municipal*, as well as the *Chatham* and *I&M* cases: that if an agency is to look at post-record, or post-forecast, events in evaluating a carrier's forecast of one cost element, it must permit the carrier an opportunity to show post-record, or post-forecast, offsetting changes in other cost or revenue forecasts, since the "touchstone" required by those cases (*I&M*, *supra*, 659 F.2d at 1198 n.14, citing *Indiana Municipal*, *supra*, 629 F.2d at 484) is *not* whether the estimate is, because of subsequent events, faulty, but whether use of that faulty estimate will yield *overall* an unreasonable result.

3. The Court's Attack On PRMSA's Methodology

In addition to cloaking the FMC's reliance on post-record events, the Court of Appeals offered an analysis of the alleged flaw in PRMSA's forecasting technique which clearly provided a rationale for the FMC's action that played no part in the agency's determination. Well-accepted principles of law proscribe such action by a reviewing court: courts may not substitute alternative grounds in support of an agency's decision that were not thought of, much less relied on, by the agency itself. *E.g.*, *SEC* v. *Chenery*, 318 U.S. 80 (1943); *accord*, *FPC* v. *Texaco, Inc.*, 417 U.S. 380, 397 (1974); *Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747, 763-64 (1973).

An examination of the FMC's discussion of its statement that PRMSA's methodology was "very tenuous" (App. B at 78a) will reveal only two criticisms: that

PRMSA did not establish a direct relationship between its costs and ARAD forecasts, and that "only" 1980 fuel costs were used as the data basis for the projection. The Court said, however, that:

> [*The Commission*] *also questioned the efficacy of a mere straight-line extrapolation, see* C.D. at 33 n.36; J.A. at 33 n.36, basing its skepticism on examination of the actual data which formed the basis of PRMSA's forecast and *concluding from them that the data did not readily lend themselves to a straight-line trend analysis.*

App. A at 18a (emphasis added). The Court notes (App. A at 18a, n.17):

> Given the wide variance of changes [in PRMSA fuel prices] from quarter to quarter in 1980, it was not unreasonable for the Commission to question a forecast methodology that assumed a constant increase per quarter.

In fact, however, the reader will search in vain for *any* suggestion by the FMC that the data "did not readily lend themselves to a straight-line trend analysis" or for *any* criticism at all of the statistical method—the linear least square fit regression formula—used by PRMSA.[7]

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[7] The Court's citation for its statement that the FMC "questioned the efficacy of a mere straight-line extrapolation" is to note 36 of the FMC's decision (App. B at 78a). Note 36, however, merely points out that the methodology used by another party (GVI/PRMA), a straight trend line analysis, had been successfully shown, by PRMSA, to be unacceptable, because (according to the FMC) the data followed no clear trend line. *The straight trend line analysis rejected by the FMC there is not the same as the linear least square fit methodology used by PRMSA.* The FMC's unelaborated statement in note 36 that PRMSA's exhibit establishing the unacceptability of GVI/PRMA's methodology "also points out PRMSA's extenuated forecast technique" may mean anything, but it certainly must have some relationship to the criticisms offered by the FMC in the text of its decision. To read that statement as questioning the efficacy of the linear least square fit regression formula, nowhere else criticized by the FMC, is to read something that simply is not there.

The FMC at *no* time questioned the technique of forecasting a constant increase per quarter; it merely criticized the use of only 1980 costs in forecasting those constant increases per quarter. *The Court's totally new suggestion that PRMSA's projection should have been something other than a regression formula which yielded constant increases per quarter was a criticism never even intimated by the FMC.*[8] To justify the FMC's finding of a flaw in PRMSA's methodology, the Court thus went far afield.[9]

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[8] The basic answer to the Court's finding that the linear least square fit regression analysis projecting constant quarterly increases is not appropriate for the fast-breaking energy market is that alternative formulas not yielding steady quarterly increases *require prediction of intermediate turning points.* Of course none of this debate is on the record because the Court raised on its own criticisms of the least-square-fit regression formula, apparently based upon its independent delving into statistical theory. (See App. A at 19a & n.18.) This episode is an excellent demonstration of the wisdom of the rule requiring courts to judge agency decisions only on the basis of agency rationales.

[9] The one actual agency rationale for finding PRMSA's fuel forecast "unreasonable" that the Court did consider and endorse is wholly unfair. The FMC said, and the Court agreed (App. A at 19a), that PRMSA's methodology, to be acceptable, would have to show a *past relationship* between its costs and ARAD prices *as forecasted by DRI.* All that such a correlation could conceivably show was how good a forecasting service DRI was, since it is conceded by the FMC (and apparently by the Court, see App. A at 15a-16a) that there is in fact a correlation between ARAD, *i.e.*, crude, oil prices and PRMSA's, *i.e.*, Bunker C, oil prices. Yet it was the same DRI which was the service used *by the FMC* to project inflation cost, with no standard imposed there of a test of DRI's track record. There was no evidence introduced to counter PRMSA's testimony that DRI is a well-known, highly respected, and independent organization in the business of forecasting, *inter alia*, crude oil prices. A holding that ratemaking methodology is flawed unless it corroborates the past accuracy of a prestigious independent forecaster is so wrong on its face that it stands exposed as a concocted flaw. The real and impermissible ground of the rejection of PRMSA's fuel forecast remains dramatic changes in world oil markets after the record had closed—the only post-record event known to the agency.

4. The Court's Decision Conflicts With the *Indiana Municipal* Case

The Court plainly ignored the traditional boundaries between the functions of courts and of administrative agencies: it offered new criticisms of PRMSA's forecast methodology which did *not* form the basis for the FMC's findings on that point, and it transformed the FMC's explicit reliance on "dramatic changes in world oil markets," none of which were reflected in the record, to a "legitimate uneasiness" about PRMSA's prediction aroused by several newspaper and magazine articles which *were* in the record dealing with potential stagnation in the oil market. These distortions of what the FMC actually did enabled the Court to ignore the standards for review of last-year ratemaking established in the 7th Circuit's opinion in *Indiana Municipal*, and in opinions by other panels of the Court in *I&M* and *Chatham*, while purporting to endorse them.

The Court maintained, for example, that the cited cases do not require the agency "to blindfold itself, ignoring dramatic changes in circumstances which surface during the ratemaking proceeding and are bound to affect the estimate." App. A at 24a. The "dramatic changes in circumstances" never surfaced during the ratemaking proceeding, however, *nor did PRMSA ask the FMC or the Court to blindfold itself to any event*: it merely asks that, *if* the FMC is to take into account post-record (or even post-forecast) changes in circumstances affecting a single area of cost or revenue, it must likewise take into account post-record or post-forecast changes in circumstances affecting *other* areas of cost or revenue *at the same point in time*. That is the lesson of *Indiana Municipal*, *I&M* and *Chatham*, and that is the critical element of this case which the Court of Appeals ignored: an estimate reasonable when made, if shown by unforeseeable subsequent events to be faulty, must nevertheless be accepted unless use of the faulty

estimate would cause the overall rate result to be unreasonable. The failure to consider offsetting matters relating to other cost or revenue estimates, which may be equally dramatic but less visible to the FMC, *e.g.*, the deepening recession and its effect on the Puerto Rican trade, means that the touchstone required by other test-year ratemaking cases—rejection of the estimate only if it renders the overall result unreasonable—has been repudiated.

The Court appeared to endorse principles akin to the standards prescribed in *Indiana Municipal*, *I&M* and *Chatham*:

> The agency should not and cannot, consistent with its statutory obligation, base rates on cost estimates that, even if reasonable when first presented, are later contradicted by record evidence *and would lead to an unjustified burden on shippers.*

App. A at 26a (emphasis added). One can scarcely quarrel with this as a statement of principle, but it was not applied by the Court to this case. *We do not know whether use of the cost estimate would lead to an unjustified burden on shippers* because the Court eliminated the touchstone of the test-year ratemaking cases—the presentation of offsetting considerations so that the overall rate result can be determined.[10]

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[10] The felicity, indeed the necessity, of the core of the 7th Circuit's standard for test-year ratemaking—that offsetting changes be considered because the focal point of the whole process is the overall result—is demonstrated by the subsequent financial results in this case as shown in subsequent materials filed with the FMC. On February 10, 1982, the FMC approved a 13% rate increase for PRMSA, based in part upon a PRMSA loss of over $5,000,000 for its last fiscal year, a period which includes four months of the test year in the case at bar. PRMSA represented to the FMC in Docket 82-14, Notice of Inquiry Regarding Regulation of the Domestic Offshore Trades (Response of PRMSA, p. 13 (May 10, 1982)), that its current financial report for July 1, 1981 through February 21, 1982—the remaining eight months of the test year—shows an additional cumulative loss of $8,844,000.

CONCLUSION

We respectfully suggest that the Court of Appeals has, in the respects outlined above, overstepped the proper boundaries between courts and administrative agencies. The motivation for the Court's action may well have been its erroneous reading of the Intercoastal Shipping Act, leading it to believe that carriers are provided with remedies for FMC error not available to shippers and hence persuading the Court to seek to protect shipper interests by upholding the FMC's decision. The result of the Court's action is an abrogation of the principles established by the 7th Circuit in *Indiana Municipal* and by other panels of the D.C. Circuit in *I&M* and *Chatham*. The result of changing the rules of the road as laid down in those cases is to sustain an agency decision that PRMSA must refund millions of dollars to shippers to avoid reaping exorbitant profits in a period which later materials furnished the agency show to have been marked by staggering losses.[11] For the above reasons,

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[11] After the Court of Appeals affirmed the Commission's action, PRMSA filed a petition for emergency relief with the Commission. In that petition, filed on June 11, 1982, PRMSA represented to the agency that its current cumulative deficit was 57 million dollars; that during the test year for which the Commission had expected PRMSA to make excessive profits, PRMSA actually incurred an operating loss of over four million dollars; that payment of the refunds ordered by the Commission would increase the operating loss for that period to over nine million dollars; and that PRMSA's cumulative loss for the current fiscal year was expected to be in the neighborhood of fifteen million dollars. PRMSA therefore requested the Commission to modify its order in Docket 81-10 and to rescind the requirement that PRMSA refund freight charges to shippers. The United States Department of Transportation ("DOT"), not previously a party to Docket 81-10, filed a petition with the Commission for leave to intervene. In its petition, DOT pointed out that the Commission has ample statutory authority under section 25 of the Shipping Act, 46 U.S.C. § 824, to reverse or modify its order; that the Commission bears a responsibility to administer its statutory authority in such a manner as to avoid results that could prove unjust to carriers and detrimental to commerce; and that the Com-

PRMSA requests that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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mission is not free to ignore compelling new facts establishing that PRMSA's rates were in fact just and reasonable and that refusal to modify the order would cause serious economic harm. The Commission is being advised by its own Bureau of Hearings and Field Operations, as well as by GVI/PRMA and DTPTC, that it has no power to modify its orders under Public Law 95-475. PRMSA's petition to the Commission is pending at this time, and is being pursued without prejudice to this petition for writ of certiorari, which raises entirely different issues.